

United States  
**Court of Appeals**  
For the Ninth Circuit

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ELMER SCHNEIDMILLER,

*Appellant,*

vs.

ADOLPH W. ENGSTROM, Trustee in Bankruptcy  
for Northwest Chemurgy Cooperative, a Corpora-  
tion, Bankrupt,

*Appellee.*

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SUPPLEMENT TO REPLY BRIEF OF APPELLANT

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JOSEPH L. HUGHES,  
BENJAMIN H. KIZER,  
Old National Bank Building,  
Spokane, Washington.

GRAVES, KIZER & GRAVES  
Of Counsel

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*Appeal from the United States District Court  
for the Eastern District of Washington,  
Northern Division*

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PAUL P. O'BRIEN,  
CLERK



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## SUPPLEMENT TO REPLY BRIEF OF APPELLANT

We must confess that in the brief time (10) days) allotted for preparing, printing and serving our reply brief we failed to discover that § 712 of the chapter on Arrangements (11 USCA), of critical importance, has a most instructive history in a previous enactment. This earlier enactment furnishes a complete and conclusive answer to the trial court's legal position in respect of our Objection No. 1 (R. 26).

Because of the importance of this point and the clear light this earlier statute throws upon the construction of § 712, we ask the indulgence of the court in troubling it with this supplement to our reply brief.

In arguing that a petition for an arrangement of a debtor is an application for the appointment of a receiver within the meaning of Remington's Revised Statutes, § 5831-4-6, the learned trial judge, in his opinion, declared (R. 10):

“The petition for arrangement, from its inception, serves the purpose of an alternative petition for adjudication. \* \* \* In legal effect, it (the petition for arrangement) is the same thing as the application for the appointment of the trustee.”

It will be observed that this is sweeping language. It treats the petition for an arrangement as the equivalent of “an alternative petition for adjudication” for all purposes.

In seeking to sustain this position of the court, appellee at page 14 of his brief placed emphasis on 11 USCA, § 712, from the chapter on arrangements, which is there quoted to the following effect:

“Where not inconsistent with the provisions of this chapter, the *jurisdiction, powers, and duties of the court* shall be the same— \* \* \*

- (2) “Where a petition is filed under Section 322 of this act as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this chapter was filed.” (11 USCA, § 712)

On scrutinizing closely the terms of § 712, however, it is seen that Congress has carefully limited the application of a petition for an arrangement in this respect to “the *jurisdiction, powers and duties of the court,*” and grants no such effect to the powers of its officers, or of a trustee, or to the rights of creditors. Following up the earlier history of this section, we now find that this § 712 has been taken, with significant omissions, from 11 USCA, § 202(m). This history of the earlier form of § 712 is disclosed by reference to the volume 11 USCA, Bankruptcy, §§ 201-500 at page 4 where we find it recited that:

“Section 201, subd.(m): Similar provisions are now contained in sections 711 and 712 \* \* \* of this title.”

This original § 202(m), which is § 74(m) of the Bankruptcy Act provided as follows:

“In proceedings under this section, except as otherwise provided therein, the jurisdiction and powers of the court, the title, *powers*, and duties of its officers and, subject to the approval of the court, their fees, *the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the property of the debtor* and the jurisdiction of appellate courts shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor’s petition or answer was filed and any decree of adjudication thereafter entered shall have the same effect as if it had been entered on that day.”

Turning back to § 712 we now see that it is *only* the “jurisdiction, powers and duties of the court” that may be treated as relating back to the date of filing the petition for an arrangement. On the other hand, by this deliberate omission of the clauses “the titles, powers and duties of its officers and \* \* \* the duties of the debtor and the rights and liabilities of creditors and of all persons with respect to the property of the debtor,” Congress has made it sun-clear that it does not intend to relate these powers and rights of creditors or of their trustee, arising out of the adjudication and appointment, back to the date of filing a petition for an arrangement. Yet, this is exactly what the trial court has undertaken to do.

This is the place to apply the familiar rule called to our attention by appellee on page 34 of his brief in a quotation from *Graffell v. Honeysuckle*, 30 W. 2d 390, 191 P. 2d 858:



“where a material change is made in the wording of a statute, a change in legislative purpose must be presumed.”

Such an application of the rule inevitably results in the following conclusion. Where, as here, the powers of the trustee as an officer of the Bankruptcy Court and the rights of the creditors represented by him are involved, the deliberate exclusion from § 712 of the powers earlier granted to the trustee and to the creditors under § 202(m) amounts to a prohibition of the right of the trustee to treat the date of the filing of the petition for an arrangement as if it were the date of an application for the appointment of the trustee.

Again craving the indulgence of the Court in submitting to it this Supplement to our Reply Brief, we again respectfully submit that the judgment of the trial court should be reversed.

Respectfully submitted,

JOSEPH L. HUGHES,  
BENJAMIN H. KIZER,  
*Attorneys for Appellant,*  
*Elmer Schneidmiller.*

GRAVES, KIZER & GRAVES  
Of Counsel.